MULTISTATE TAXATION OF THE TRANSPORTATION INDUSTRY

GEORGE D. BRABSON*

In a highly urbanized society that has grown up over a geographical area reaching out over more than sixty degrees of longitude, and covering the boundary lines of forty-eight sovereign states, each with its sovereign legislative body—it was inevitable that the conflicts of law under the commerce clause of the Constitution would strike with peculiar force at the transportation industry. The United States is a vast network of railways and highways connecting these urban manufacturing and consuming centers, and undoubtedly owes much of its economic strength and progress to the development of this interstate transportation system.

In similar sequence it was just as inevitable that the difficulties inherent in the taxation of such a complex system of commerce should have specific and peculiar application to the transportation industry. If we examine the record of the problems of taxation of interstate commerce from as far back as *Re: The Daniel Ball*,[1] and continue our examination up to *Railway Express Agency v. Virginia*,[2] the decisions of the courts bear heavily on the transportation industry.

It cannot be said that the general doctrine of immunity as to the transportation industry was developed independently of other industries or of other commerce between the states. As a matter of fact much of that doctrine was developed through the operations of other types of industry and commerce in which the instrumentalities of interstate transportation were only incidentally involved. On the other hand, it can be said that the doctrine of immunity has been more strictly and rigidly applied to the transportation industry where the actual tools and instrumentalities of carriers have been involved than to any other type of taxpayer. And that doctrine as it applies to the properties of carriers goes back as far historically as in the case of any other industry.

From the beginning of our constitutional system it seems to have been recognized by the Federal courts at least that the actual or physical movement of commerce across state boundaries cannot be burdened with any sort of tax.[3] On the other hand, the Supreme Court held in *Coe v. Errol*, cited above, that there was nothing whatever in the Federal Constitution to prevent a city from taxing the goods of commerce gathered together and brought into the city for the purpose of an interstate shipment. In that case Justice Bradley, speaking for the Court, held flatly that goods and merchandise do not cease to be a part of the

* Tax Attorney, Ohio Oil Co.; George Washington University, M.A.; Yale University L.L.B.

[1] The Daniel Ball, 77 U. S. (Wall) 557 (1862).

[2] Railway Express Agency v. Virginia, 347 U. S. 357 (1955).

[3] See Coe v. Errol, 116 U. S. 517 (1886), where the cases are reviewed.

general mass of property in a state subject to its jurisdiction and taxation until they have been shipped or delivered to a carrier for transportation to another state, or have been started on such transportation in a continuous route or journey.

In the still earlier case of *The Daniel Ball*, cited above, the Supreme Court said:

> Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or forest to the depot is only an interior movement of the property, entirely within the state, for the purpose it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself.

These two early decisions of the Supreme Court seemed to have charted a course for the conduct of common carriers, and laid some basis at least for the states to follow in determining when and under what conditions the property, franchises and income of the carrier itself were engaged in interstate commerce. For a good many years this appeared to be the case and the states were chary of attempting to tax the instrumentalities of interstate transportation. This doctrine lasted just about as long as the haloes around the heads of the big railroads lasted, which is to say until the state legislatures beheld these large and growing corporations doing business in their midst. Then it was that the legislatures began to question why the theory of interstate commerce should give immunity from state taxation, and to propose the imposition of taxes upon these instrumentalities in a little different form or of a different variety.

Insofar as multistate transportation agencies are concerned, these later forms of taxation have fallen into three broad categories, to-wit: income or license taxes arising out of the gross or net income from business done within a state; franchise and privilege taxes based upon the privilege of doing business within the taxing state; and property taxes imposed upon the property used in business within a state. To retrace the historical development of each of these doctrines would require a long analysis of many conflicting decisions and would serve no useful purpose here. It will rather be the purpose of the author to briefly outline the broad doctrine which has been developed in each of these three categories, and to indicate to what extent each such doctrine has been followed or has been deviated from in the more important decisions that have followed.

Franchise and Business Privilege Taxes

The trend of the law in this field was forecast at an early date by the decision of the Supreme Court in *Brown, v. Maryland*[4], and later

[4] 25 U. S. (Wheat.) 419 (1827).

in *Robbins v. Shelby County Taxing District.*[5] The doctrine in these and other cases decided in that period can be summarized somewhat as follows:

1. Taxing power is inherent in the sovereign states of the Union and remains in them until delegated;
2. The commerce clause is not a delegation of the power to tax, but is rather a prohibition against the burdening of commerce between the states by one or more states;
3. The states in their efforts to tax the business carried on between states:
   a. May not tax interstate commerce itself, or the privilege of doing business in interstate commerce; to-wit, the franchises or licenses of the taxpayers;
   b. Must apportion taxes on gross or net income to that amount attributable to intra-state commerce within such state;
   c. Must not discriminate through taxation against interstate commerce, or directly burden such commerce.

One of the earlier cases where this doctrine was applied to the transportation industry was in *Norfolk and Western Railroad Company v. Pennsylvania*[6], which involved a franchise tax on the right to do business in Pennsylvania. The Supreme Court held that the statute itself was invalid as it applied to a railroad company which did not exercise any privilege or franchise in Pennsylvania not connected with interstate commerce or required for the purpose of such commerce.

In that case Justice Lamar, speaking for a divided Court, said this:

> It is well settled by numerous decisions of this Court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits. Some of the cases sustaining this proposition are collected in *McCall v. California,* 136 U. S. 391, and need not be repeated here.

The Court then went on specifically as to a railroad carrier to hold that the business of a through line of a railroad which consists of carrying freight and passengers into and out of a state constitutes a part of interstate commerce, and hence any one of the roads or branch lines forming a part or link in the through line is engaged in interstate commerce, since the business of each one of the roads or links serves to increase the volume of business done by the through line, citing *The Daniel Ball,* and *Wabash, St. Louis and Pennsylvania Railroad Company v. Illinois.*[7]

The same strict doctrine seems generally to have been followed in later decisions of the Supreme Court, such as *Lyng v. Michigan,*[8] *Cheney*

5 120 U. S. 489 (1887).
6 136 U. S. 114 (1890).
7 118 U. S. 557 (1886).
8 135 U. S. 161 (1890).

Bros. v. Massachusetts[9] and *Ozark Pipe Line Co. v. Monier.*[10] In *Cooney v. Mountain States Telephone & Telegraph Company,*[11] the Supreme Court applied the rule to both transportation and communication facilities and overruled the right of the State of Montana to levy a license tax on such instrumentalities. The Court said that while a state may require payment of an occupation (business privilege) tax on a corporation engaged in both intrastate and interstate commerce, it cannot levy a tax on interstate commerce itself or upon the business and instrumentalities which constitute interstate commerce, or the privilege of engaging therein. The Court also said that the ability to tax the portion which is intrastate does not justify a tax either upon the interstate part of the business, or upon the business as a whole without discrimination.

An oblique development of the doctrine appeared in *Ozark Pipe Line Co. v. Monier.*[12] In that case, with Justice Brandeis dissenting, Justice Sutherland held that notwithstanding local business activities such as the maintenance of offices, telephone and telegraph lines, trucks and cars, the purchase of supplies and employment of labor, all within the State of Missouri, and all devoted to the operation of a through pipe line system—the State of Missouri had no power to levy an annual franchise tax on the capital stock of a foreign corporation operating that system, since the operation of a through pipe line system originating in another state, passing through Missouri, and entering into a third state constitutes interstate commerce exclusively and cannot be taxed by any state.

In the still later case of *Memphis Steam Laundry Cleaners, Inc. v. Stone*[13], the taxpayer operated a fleet of trucks which crossed into Mississippi and Arkansas and picked up and delivered laundry to customers in those states. The State of Mississippi sought to tax the business done in that state by imposing a license tax on each driver soliciting business in that state. The Supreme Court struck down the tax, saying:

> In the long line of "drummer" cases, beginning with Robbins v. Shelby County Taxing District, 1887, 120 U. S. 489, 7 S. Ct. 592, 30 L.Ed. 694, this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interestate commerce. As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'Interstate commerce itself knocks on the local door.'

On the other hand, there has been a flood of cases in fairly recent years where the courts have sustained franchise and business privilege

[9] 246 U. S. 147 (1918).
[10] 266 U. S. 255 (1925).
[11] 294 U. S. 384 (1935), 55 S. Ct. 477.
[12] See Footnote 10, *Supra.*
[13] 342 U. S. 389, 393 (1952).

taxes where the taxpayer was engaged in substantial local business activities and a substantial part of its business could be traced to those activities. These cases include *Atlantic Coast Line Railroad Company v. Doughton*,[14] *Postal Telegraph Company v. City of Richmond*,[15] and *Eastern Air Transport, Inc. v. South Carolina Tax Commission*,[16] which outline the exceptions to the general doctrine of immunity. In the *Postal Telegraph* case the Court said:

> A state may lawfully impose a license tax restricted . . . to the right to do local business within its borders . . . where the local business . . . is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce.

In the *Eastern Air Transport* case the Supreme Court went so far as to hold that a state has the power to lay a license tax on the sale or use of property even though it forms part of the instrumentalities of commerce. The tax there was designated as a license for the privilege of selling gasoline in that state. The Court said that whether the tax was an excise on the privilege of selling gasoline or was a property tax on the gasoline itself was immaterial. In either case the tax was validly imposed upon a local activity, was non-discriminatory as to foreign taxpayers, and constituted no burden on interstate commerce even though the taxpayer's sole business was transportation of freight and passengers in such commerce.

In the case of *Memphis Natural Gas Company v. Stone*[17], the Supreme Court went the limit in upholding the right of a state to impose a franchise tax on the transportation industry. In that case the gas company operated a natural gas transmission pipe line which ran through a portion of Mississippi and ended in Tennessee. Two pump stations were located in Mississippi and the company sold natural gas wholesale at several points in that state. The state imposed a general franchise tax on all corporations doing business in Mississippi based on the amount of capital used, invested or employed in the state.

Both the Supreme Court of Mississippi and the Supreme Court of the United States upheld this franchise tax fundamentally on the basis of the local business activities on which the tax was based. In a divided Court opinion the U. S. Supreme Court said that these local business activities were the basis for a franchise tax in controversy; that the taxpayer operated local compressor stations and had other local activities. Then the Court added:

> The cases just cited . . . show that from the viewpoint of the commerce clause where the corporations carry on a local

[14] 262 U. S. 413 (1923).
[15] 249 U. S. 252 (1918).
[16] 285 U. S. 147 (1932).
[17] 335 U. S. 80 (1948).

activity sufficiently separate from the interstate commerce state taxes may be validly laid.

One of the more recent developments of this doctrine as it affects the transportation industry is, of course, the case of *Spector Motor Service, Inc. v. O'Connor*[18], decided by the U. S. Supreme Court in 1951. In that case a Missouri corporation engaged exclusively in the operation of a number of trucks in interstate commerce and maintaining a series of pickup stations in various states, was called upon to pay a Connecticut license tax for the right to operate its trucks in that state, measured by the net income derived therefrom. The Supreme Court rejected various arguments as to the nature of the tax as an income tax. It held that since the tax was imposed on the corporation's right to do business in Connecticut it was in effect a tax on the business itself, and since that was exclusively interstate in character, the tax was in violation of the commerce clause and therefore invalid.

The *Spector Motor Service* case has aroused more interest and comment than any case decided in this area for many years. One of the principal reasons for this is that the case seemed to put a quietus on any further extension of the so-called "local activities" rule, and to foreshadow a return by the Court to the general doctrine of immunity found in the earlier decisions of the Court. Another reason for this unusual interest and comment lies in the fact that many tax men are unable to reconcile some of the language in the *Spector* case to what was actually decided in that case.[19] The Court makes the broad statement that a state is not precluded from imposing taxes upon activities or aspects of interstate commerce which are subject to the sovereign power of the state, and that it is only necessary that the tax burden be related in some way to the sovereign powers of the state, and that the tax be non-discriminatory. Notwithstanding that doctrine the Court held invalid a tax which was clearly related to the general sovereign powers of all the states, and which the Court specifically held to be a non-discriminatory tax. The basis for the Court's decision lies in the fact that the taxpayer's business was exclusively in interstate commerce, and hence was not subject to state taxation no matter how fairly the tax could be apportioned. It is, of course, difficult to reconcile the *Spector* case with *Memphis Natural Gas Company v. Stone, supra,* where in dealing with a similar tax under almost identical conditions the Court reached a different conclusion.[20]

We now come to *Railway Express Agency v. Virginia*,[21] which is one of the last decisions of the Supreme Court in this area of franchise

[18] Spector Motor Service v. O'Connor, 340 U. S. 602, (1950).

[19] Cox, *The State's Power and Constitutional Limitations to Tax,* TAXES, The Tax Magazine, November, 1952, p. 910.

[20] Drazen, *Recent Trends in State Taxation,* TAXES, The Tax Magazine, April, 1956, p. 286.

[21] 347 U. S. 359 (1954).

taxation, and which Mr. Justice Jackson characterized as "another variation in the endless problems raised by efforts of the several states to tax commerce as it moves among them." In that case the taxpayer, a Delaware corporation, was prohibited by Virginia laws from doing any public service business in Virginia except that done in interstate commerce. Nevertheless it had many offices in that state, owned real property, motor vehicles, etc., and carried on a general express business in the state operating largely through a Virginia subsidiary. The state attempted to impose its general tax on gross receipts to taxpayer applicable to all express companies. The taxpayer continued with the contention that since its business in Virginia was entirely interstate, the state could not impose a license tax in any form for engaging in that business.

The Supreme Court of Virginia[22] upheld the tax on the ground that it was (in spite of its designation) a tax on property, i.e. a tax on the intangible property value of the good will of the business, and hence as property employed in Virginia it was subject to tax by the state. The U. S. Supreme Court rejected this argument as factitious, and held that it was in reality a license tax based on the privilege of engaging in the express business, and since the taxpayer was engaged only in interstate business in Virginia, the tax was a burden on such commerce and invalid.

In the light of these decisions which are believed to reflect the varied points of view of many state and inferior Federal Courts, the trend of the doctrine of immunity as it applies to the transportation industry may be summarized along these lines:

1. All the states have inherently the sovereign power to tax the franchises and privileges that come within their jurisdiction;
2. Wherever a foreign transportation agency uses or exercises franchises and privileges confined to the field of interstate commerce, which do not grow out of local business activities related to such commerce, the states may not burden interstate commerce by taxing such franchises or privileges;
3. On the other hand, to the extent that a foreign transportation agency engages in or draws upon local business activities not in and of themselves a part of or related to interstate commerce, the franchise or privilege of transporting such business may be taxed by the state, provided a fair apportionment of the tax is made between local transportation business and interstate transportation business.[23]

State Income Taxes

Sufficient has already been said under the subject of Franchise and Privilege Taxes to avoid a repetition of the historical growth of the general doctrine of immunity as applied to transportation agencies. In

[22] 194 Va. 757, 75 S. E. 2nd 61. (1953).

[23] See the discussion of this problem as it relates to interstate commerce generally in U. S. Glue Co. v. Town of Oak Creek, 247 U. S. 321 (1918).

fact it can be said that the modern trend in the area of state income taxes began with the decision of the United States Supreme Court in the case of *U. S. Glue Company v. Oak Creek*,[24] cited above. That case imposed an income tax based upon net income from all sources within the State of Wisconsin upon all corporations engaged in business in that state, and measured the tax by the net income derived both from interstate and intrastate business.

The Supreme Court held that while a state may not directly burden interstate commerce by levying a tax on such commerce, it may impose a tax which only "indirectly affects" the income or profits from such commerce. The Court then went on to say that a tax on gross receipts would be a direct tax on such commerce and hence invalid, but that a net income tax was "manifestly and substantially" different, and that this difference "affords a convenient and workable basis of distinction between a direct burden upon the business affected, and a charge that is only indirect and incidental."

This new doctrine was, of course, at variance with the long-established and long-adhered to doctrine of virtual immunity which the agencies and instrumentalities actually engaged in transporting interstate commerce had always enjoyed. This principle of immunity had been followed by all the Federal Courts since the case of *Leloup v. Port of Mobile*[25] was decided in 1888. In that case the Court stated the principle of immunity as follows:

> No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.

A very serious question can be raised on the sheer economics of the decision in the *Oak Creek* case. It may be recalled that just prior to the time that case was decided in 1918 the Federal Income Tax rate was only 2% on corporations and the Wisconsin tax in question was 2%. With the present Federal rate on corporations at 52% and no apparent constitutional limit on the Wisconsin tax rate, it seems doubtful if any court could any longer dismiss such taxes as only an "incidental" burden on interstate commerce, regardless of the fact that it was imposed in the form of a net income tax rather than a levy on gross income.

---

[24] 247 U. S. 321 (1918).

[25] 127 U. S. 640 (1888). But see State Tax on Railway Gross Receipts, 82 U. S. 284 (1872), where the Supreme Court sustained a Pennsylvania tax on the gross receipts from freight charges received from goods transported in interstate commerce. The Court avoided the constitutional question by holding that merchandise shipped in interstate commerce ceased to be immume from state taxation after it became intermingled with the other properties of the carrier in the taxing state; hence may be the subject of a gross receipts tax.

Be that as it may, the *Oak Creek* case is cited in this connection primarily because it represents such a distinct departure from prior decisions of the Court, and also because it cites a case involving the transportation industry in its support. This case was *St. Louis and Southwestern Railway v. Arkansas*,[26] decided in 1912. But that was a case involving property taxes which the State of Arkansas sought to impose on an interstate railroad running through the state and owning real and personal property at various places in the state. The Court upheld such taxes on the ground that the property was located in the State and used in that State, as part of the mass of property of all its citizens.

In this connection it should be noted that while there were a number of cases which followed the *Oak Creek* case[27] and seemed to be expanding that rule to cover almost any conceivable situation, the Supreme Court did not hold in any of them that this doctrine could be applied in the absence of some evidence at least of intrastate business. There is some dicta even by the Supreme Court in those cases, but in none of them was the Court actually called upon to decide that issue where there was no intrastate business done by the taxpayer. It should also be noted that none of these cases involved taxpayers engaged in the transportation industry itself. The development of the doctrine of upholding taxes based upon net income as constituting only an indirect or incidental burden came about largely through cases involving other industries.

Shortly after the *Oak Creek* decision and while it was still regarded as a curious case, the Supreme Court decided *Shaffer v. Carter*,[28] which involved both a producer and transporter of crude oil. Shaffer, a resident of Illinois, produced oil in Oklahoma and transported it for sale outside that state. Oklahoma sought to impose its income tax upon the income derived from sales negotiated in Oklahoma but shipped elsewhere. The Supreme Court charted a new course around the commerce clause by saying that merely because merchandise is used in interstate commerce or the products shipped in or out of a state does not create an immunity to a tax on the income derived from such transactions. Said the Court:

> . . . just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein; enforcing payment so far as it can, by the exercise of a just control over persons and property within its borders.

The gist of this decision is, of course, that in order to be taxable

---

[26] 235 U. S. 350 (1912).

[27] See Western Livestock v. Bureau of Revenue, 303 U. S. 250 (1937) and cases cited there in.

[28] 252 U. S. 37 (1920).

the income must be derived from property in or business done within the taxing state *or* the state must have jurisdiction over the person being taxed. Within a few years these propositions had become almost commonplace, so that the case of *Western Livestock v. Bureau of Revenue*[29] cited above, did not excite great attention although it threw a new angle into the picture.

In the *Western Livestock* case a magazine publisher prepared, printed and distributed advertising material largely through the mails. It sold advertising space to customers in every state. All the physical work of preparing the copy, printing it and shipping it took place in New Mexico, although the materials themselves went to out-of-state purchasers. New Mexico imposed an income tax on the revenue derived from the sale of advertising space.

The Supreme Court ignored several cases holding that the local activities connected with interstate commerce may become a part of the process of generating and increasing such commerce, and proceeded to hold contrarywise that the physical acts of preparing, printing and distributing the printed matter were controlling, and that these constituted local business activities of sufficient consequence upon which the State could base its income tax. Inferentially the Court held that an income tax upon the income of such a taxpayer could only be regarded as an "indirect burden" on interstate commerce, even though all the taxpayer's income came from without New Mexico.

The case which really gave a twist to this new doctrine of "indirect and hence taxable" burden in the area of income taxation was the case of *West Publishing Company v. McColgan*.[30] In that instance the taxpayer, a Minnesota corporation, was engaged in selling lawbooks throughout the United States. In California it maintained no offices or warehouses, solicited orders exclusively through "agents and employees" who were in reality solicitors having space in lawyers' offices, and all its books and magazines were shipped into California from warehouses located outside the State. Taxpayer claimed it was exempt from the California Corporation Income Tax because it was engaged entirely in interstate commerce and had no income derived from intrastate commerce in California. The State contended first that the taxpayer was carrying on sufficient local business activity to generate income from California sources, and second that even if the taxpayer's business was wholly interstate in character it was still liable to the California tax, because that tax was an indirect tax on income which was subject to such a tax regardless of its character.

The Supreme Court of California obviously decided the case on the first issue, since it held that the solicitation and other activities of

29 303 U. S. 250 (1937).

30 328 U. S. 825 (1946), affirming 27 Cal. 2d 705, 166 P. 2d 861, and citing Oak Creek, *supra* note 23, and Memphis Natural Gas Company cases, *supra* note 17, and Interstate Busses Corp. v. Blodget, 276 U. S. 245. (1927).

the taxpayer's agents and employees in California constituted "substantial income-producing activities," and that based upon these benefits and protection of taxpayer's business the State could validly impose an income tax. However, the Court went further and accepted the second argument *in toto*, citing the *Memphis Natural Gas Company*, the *Oak Creek* and *Atlantic Coast Line* cases, *supra*, as well as *McGoldrick v. Berwind-White Coal Mining Company*[31] and similar cases in the Federal Courts as its authority. It stated in passing that there is a difference between a tax whose subject is the privilege of engaging in interstate commerce, and a tax whose subject is the net income from such commerce. It further stated as one of its basic conclusions that a state "may tax that income from operations in interstate commerce, although a tax on the commerce itself is forbidden." It then ended up with a final pronouncement that "a tax may be levied by a state on net income wholly derived from interstate commerce." It cited the *Berwind-White* case in support of that conclusion.

Unfortunately the *Berwind-White* case did not hold that at all. There is some dicta in the *Berwind-White* case to that effect, but the Court did not have that issue before it and hence could not decide it. All that was decided there was that the New York City sales tax was conditioned on a local activity which was subject to the taxing power of the city, to-wit, that the making of contracts in the City followed by delivery of the coal under such contracts was doing business in the city, and was sufficient to subject such sales to the city tax.

Actually, one of the first cases of the Supreme Court to decide without reservation that taxation of the net income of an interstate carrier does not violate the commerce clause seems to have been *Atlantic Coast Line v. Doughton*[32] in 1922. The Court had argued to the contrary only a year previously in *Pullman Co. v. Richardson*,[33] a case which involved, however, a tax on gross receipts. In the *Atlantic Coast Line* case the State of North Carolina imposed a net income tax on all interstate carriers, basing the tax on the net income reported to the Interstate Commerce Commission. The Supreme Court upheld the tax, basing its decision squarely on the fact that the tax was not a direct burden because it was imposed only on the net income, and on the fact that the taxing statute applied to all carriers in the state and did not discriminate against interstate commerce.

In the *Matson Navigation Company* case,[34] the Supreme Court went a little further along this general line and held that a state may tax the net income of one of its own corporations engaged in the transportation industry, even though it included all the income derived from interstate and foreign business transactions. The Court also held, however, that a

---

[31] 309 U. S. 33. (1939).
[32] Atlantic Coast Line v. Doughton, 262 U. S. 413 (1922).
[33] Pullman Co. v. Richardson, 261 U. S. 330 (1921).
[34] 297 U. S. 441 (1936).

foreign corporation whose sole business within the state was interstate and foreign in character, could not be taxed for the privilege of doing such business in the state even though the tax is measured by the net income from interstate or foreign business done in that state.

In *Yazoo and Mississippi Valley Railroad Co. v. Board of Commissioners*,[35] the Supreme Court simply affirmed a decision of the Supreme Court of Mississippi, citing the *Atlantic Coast Line* case as its authority. The Mississippi Court had held that a tax imposed upon an interstate carrier by a local levee district was not invalid because it imposed a greater burden on the carrier for the privilege of operating in Mississippi than was imposed on other kinds of taxpayers. The tax was measured by resort to a formula which placed the privilege of operating a railroad on a mileage basis, and levied the tax at a specified amount per mile of classified track.

Mr. Justice Cardozo settled the doctrine employing the use of a formula to impose a net income tax on interstate carriers, at least for the time being, in *Norfolk & Western Railway Co. v. North Carolina*,[36] decided in 1936. In that case North Carolina imposed under a special statute an income tax upon the net income of interstate railroads, and set up a statutory formula. The formula started with gross income from revenues derived in North Carolina, including the equal mileage proportion within the state of the carrier's interstate business, and deducting therefrom the proportionate average of its operating expenses to its entire expenses. The Supreme Court held two things: (1) that mileage in a state may have a relation to a tax on net income, which it may not bear to a tax on property or on a franchise; and (2) that a division of the revenues and expenses of an interstate carrier which carries on a unitary business can only be done with a fair degree of reasonableness, and the use of a formula to do so is not invalid. Justice Cardozo accepted without question or argument the principle that such a carrier may be taxed on its net income even though it is engaged exclusively in interstate commerce.

Shortly thereafter in *Great Northern Railway Co. v. State of Washington*[37] the Supreme Court had before it the question whether a state may impose a tax on the gross income of an interstate carrier, under the theory that such a tax was required for supervision and regulation of the local structures and operations of such a carrier. The Court upheld the right of a state in principle to impose such a tax, provided it was fair and reasonable. The Court held, however, that where such a tax is imposed under a formula or in a manner so disproportionate to the service rendered as to become an unreasonable exaction it cannot be sustained as an indirect burden on interstate commerce.

Mr. Justice Cardozo dissented on two grounds: (1) that the tax

---

[35] 311 U. S. 607 (1940).
[36] 297 U. S. 682 (1936).
[37] 300 U. S. 154 (1937).

in question was in the final analysis based upon a percentage of the gross revenues from intrastate commerce; and (2) that the burden of proof to show that the burden of the tax was disproportionate and unreasonable should have rested upon the taxpayer, rather than to require the state to prove otherwise. This rule of evidence in such cases was promptly picked up by the Supreme Court in *Bourjois, Inc. v. Chapman*,[38] which held squarely that the party challenging legislation which only indirectly affects interstate commerce must assume the burden of proof of any "undue burden" on such commerce.

One of the last touches given to the doctrine of "indirect burden" on income derived by a carrier from interstate commerce is found in *Central Greyhound Lines v. Mealey*.[39] In that case the State of New York sought to impose a tax on the gross receipts of a bus line which ran from Buffalo to New York County but passed en route through portions of Pennsylvania and New Jersey. The movement was one which the Court held to be exclusively interstate in character, and hence, said the Supreme Court, the State of New York could not impose a tax measured by "the entire gross receipts" of the taxpayer. However, the Court added by way of dictum that it saw no such problem if such a tax could have been levied by all three states and apportioned between them on some reasonable basis. The inference seems clear that even one state may impose such a tax if it confines its tax burden to the proceeds which arise out of intrastate movements.

However, in a more recent case the Supreme Court of Pennsylvania, having before it the decision of the U. S. Supreme Court in the *Spector* case, *supra*, showed considerable signs of backing away from the "indirect and incidental burden" doctrine. In the case of *Roy Stone Transfer Co. v. Messner*[40] the State of Pennsylvania had sought to impose its corporation income tax of 1951 upon the net income of the taxpayer under the guise of a "property tax on net income derived from sources within this Commonwealth." The Supreme Court, reversing the lower Court, held: (1) that in spite of its statutory designation the tax in question was a tax on net income; (2) that where an interstate carrier has no real property in a state and carries on no local business solicitation it is engaged exclusively in interstate commerce; and (3) that the mere pick-up and delivery of passengers or merchandise in a state as part of a general interstate movement cannot be classified as intrastate commerce, and hence cannot be made the basis of any tax on net income from such commerce.

By way of contrast the Pennsylvania Supreme Court, in *Wieman and Ward Co. v. Pittsburgh*, decided in 1955, held that the sale of coal in Pittsburgh by local dealers was sufficient local business activity to subject such sales to the Pittsburgh mercantile license tax (based on income),

---

38 301 U. S. 183 (1937).

39 334 U. S. 653 (1948).

40 377 Pa. 234, 103 Atl. 2d 700 (1954).

although all of the coal was brought in from other states and shipped in by river barges belonging in certain cases to the vendors. The Court said that mere delivery into the city was a local business activity sufficient to support the tax.[41]

The Supreme Court of Georgia has quite recently accepted a strict construction of the doctrine of local business activity in *Redwine v. Refrigerated Transport Corporation.*[42] In that case taxpayer's railroad cars were leased to various interstate railroads for use over their systems. These cars were used to transport refrigerated goods into and out of Georgia and were actually used to give service to local shippers and customers in that state. The Court held two things: first that the taxpayer had no offices in Georgia and was not engaged in soliciting business in that state; and second that since the taxpayer had no local activities in Georgia that state could not impose its income tax on the business taxpayer did do in Georgia, that being all interstate in character.

In Virginia a recent decision in *Arlington v. Arcade-Sunshine Co.*[43] involved transportation facilities belonging to the taxpayer and used to pick up and deliver laundry in that state, taxpayer having its plant in the District of Columbia. The County of Arlington sought to impose its business license tax based on income derived from business done. The Supreme Court of Virginia held that as to "pick-ups" the tax was not applicable since they were "part of the flow of interstate commerce." On the other hand the Court held that the maintenance of pickup stations in Virginia was different and constituted a local business activity sufficient to base the tax upon it and the taxpayer.

It is, of course, extremely different to reconcile the two aspects of the *Arcade-Sunshine* case in and of themselves, to say nothing of the decision of the Supreme Court in the *Spector* case, cited above. In the *Spector* case the taxpayer maintained exactly the same sort of local facilities for the pickup of merchandise which, upon being loaded into taxpayer's trucks, entered into and became "part of the flow of interstate commerce" just as surely as did the pickups in the *Arcade-Sunshine* case.

In summary of the many aspects of income taxation of interstate transportation agencies and instrumentalities, and taking into account the many variations in the so-called "indirect and incidental burden" theory, it is believed that the present status may be outlined as follows:

> 1. That in its broad and general application no state tax on income can discriminate against intrastate commerce, or impose an undue or unreasonable burden on such commerce.[44]
>
> 2. That no such tax can be imposed upon the gross receipts or gross income of an interstate transportation agency without

41 381 Pa. 533 (1955).

42 Redwine v. Refrigerated Transport Corp., 90 Ga. App. 784 (1955).

43 196 Va. 916 (1955).

44 Gwin, White and Prince v. Henneford, 305 U. S. 434 (1938).

the use of some formula or device for equitable apportionment, so that such a tax will bear only on the receipts from business done within that state.[45]

3. That no such tax may be predicated upon a taxable event which is subject to similar taxation by another state, since to permit such taxation would subject the taxpayer to multiple taxation of the same income derived from interstate commerce.[46]

PROPERTY TAXES ON INTERSTATE TRANSPORTATION FACILITIES

In the field of property taxes imposed by a state on interstate carriers and transportation agencies the decisions in the state courts are innumerable, and in many instances are irreconcilable. The underlying question in most such cases is whether or not the nature and use of the property is such as to confer a tax situs sufficient in character or duration upon which the tax can be laid. This depends, of course, upon the kind of property sought to be taxed, and perhaps to an even greater extent upon the nature of the tax that is involved.

The cases in the Federal Courts have managed to adhere more consistently to the basic doctrine outlining what constitutes a tax situs for the imposition of the particular tax in question, as well as to the principle of uniformity which accompanies it. In the early federal cases the courts were concerned primarily with whether or not the property was within the jurisdiction of the state on the date of the assessment, and was in the ownership and possession of the taxpayer at that moment of time, regardless of any other time element. Where the property was personal property moving in interstate commerce at the date of assessment the general trend was to exempt such property from ad valorem taxation by a state. A temporary pause or resting of the property within a state other than for purposes of use, storage or consumption within the state did not destroy the continuity of interstate movement or subject such property to tax in that state.[47]

In the *Champlain Realty Co.* case, cited above, Chief Justice Taft remarked that the commerce clause does not give immunity to moveable property from local taxation which is nondiscriminatory unless the property is in actual continuous transit. He then went on to say that most of the doubts arise when there are interruptions in the transit and when the property is still in possession or control of the owner during such transit. In that instance the Court held that the holding of logs in a

---

[45] See also Braniff Airways v .Nebraska State Board, 347 U. S. 590 (1954).

[46] Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534 (1951).

[47] Champlain Realty Co. v. Brattleboro, 260 U. S. 366 (1922); St. Louis & Southwestern Railway v. Arkansas, 235 U. S. 350 (1914); Adams Express Co. v. State Auditor (Ohio), 165 U. S. 194 (1897); Coverdale v. Arkansas-Louisiana Pipeline Co., 303 U. S. 604 (1938).

boom at one location for several days for safety purposes did not destroy their immunity from local taxation.

In the somewhat similar case of *Hughes Bros. Timber Co. v. Minnesota*,[48] the same Court and same Justice held that pulpwood sold for intrastate shipment to the purchasers in other states, and floated by the taxpayer down a river in Minnesota to a Great Lakes port for further shipment by boat across Lake Superior, constituted a continuous movement in interstate commerce, and the State of Minnesota could not impose an ad valorem tax on it at any stage of such movement. The fact that the logs came to rest in the state was wholly immaterial, said the Court, as long as they were still in the process of delivery from seller to buyer.

In *Carson Petroleum Co. v. Vial*[49] the same Court, again speaking through Chief Justice Taft, held that crude oil produced in the Mid-continent fields, transported by pipe line and railroad into Louisiana and stored there, awaiting shipment or for accumulation of sufficient cargo for ultimate transportation to foreign countries, was not subject to ad valorem tax by Louisiana, since the storage there was an inherent part of a continuous movement in interstate and foreign commerce. The Court again stressed the fact that merely coming to rest within the confines of a state does not of itself confer a taxing situs, as long as the property is actually engaged in an interstate movement of commerce.

Up until this point in 1929 it is quite obvious that the Supreme Court, without dissent, simply assumed that the immunity of such property from state tax burdens was to be determined on the basis of strict constitutional law, and that the Court did not need to concern itself with the economics of such a case, nor with the then impending shadow of the depression years and the urgent need of the states for revenue. These ulterior considerations did not come into the picture until a few years later when the states had begun to impose various kinds of temporary and emergency taxes to tide them over the depression. It should also be noted that up until this time the courts in general had not drawn a very clear distinction between property which was the subject of interstate commerce, and the instrumentalities and facilities of commerce themselves.

One of the earliest of such cases, which has been followed generally by most of the state courts, and which can be regarded as having initiated a broader pattern for the ad valorem taxation of property engaged in interstate transportation was the case of *Nashville, Chattanooga and St. Louis Railway Co. v. Wallace*.[50] There the doctrine was clearly extended to cover the property of a common carrier engaged primarily in interstate transportation. In that case a property tax laid by the State of Tennessee on the storage of gasoline in the State was sustained regardless of the fact that it was used directly in the operation of taxpayer's trains in

48 272 U. S. 469 (1926).
49 279 U. S. 95 (1929).
50 288 U. S. 249 (1933).

interstate commerce. The Court said that where the power to tax property exists it includes the power to tax all the constituent elements of the property; that the taxable element in this case was the storage of property within the state; and that it was not prohibited by the commerce clause because the tax was not imposed until after the movement in interstate commerce had ceased, and the gasoline had become a part of the mass of property within the state.

While each of the foregoing cases involved a taxpayer engaged in part at least in the transportation industry, the case of *Southern Pacific Co. v. Gallagher*,[51] involved a taxpayer engaged wholly in interstate transportation and instrumentalities used in such commerce. In that case the taxpayer purchased certain equipment from various vendors in a number of states which was shipped into California for storage and use by the taxpayer in carrying on its business as a common carrier. The State of California sought to impose its use tax upon such property effective upon termination of the transportation movement.

The Supreme Court stated the broad doctrine that a state tax on interstate commerce or consumption in such commerce was invalid, but proceeded to modify the rule by holding that the invalidity of such a tax on the use of property arises from a levy on commerce itself or on its gross receipts, but not on events prior to the movement in commerce or subsequent thereto. The Court then sustained the California tax on the ground that it was imposed on an event occurring after commerce ceased, to wit, the use of the property and exercise of property rights therein by the taxpayer in the State of California, and as one of the incidents of ownership.

The general doctrine of immunity afforded under the commerce clause as it applied to the property of carriers and other transportation agencies can be summarized at this point briefly as follows:

1. Property of a carrier constituting a part of the facilities and instrumentalities of transportation in interstate commerce may be the subject of a tax by the various states, provided it is a property tax levied only upon property having a taxing situs within that state.[52]

2. The taxing situs of personal property moving in interstate commerce as part of the instrumentalities of transportation depends upon the nature and extent of its use and employment within the taxing state.

3. Such a tax must be fairly and equitably apportioned on the basis of its use and employment within the taxing state.

Such were the broad outlines of the doctrine of immunity as it affected the property of interstate carriers themselves up until the advent

---

[51] 306 U. S. 167 (1939).

[52] See the U. S. Supreme Court cases starting with Western Union Telegraph Co. v. Attorney General, 125 U. S. 530 (1888), and running to Juget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (1937).

of the airplane into the field of interstate transportation. The coming of air transportation has introduced so many new elements into the picture that Justice Frankfurter referred to the problem in the *Braniff Airways* case[53] in the following language:

> Until Congress acts, the vital thing for the Court in this new and subtle field is to focus on the process of interstate commerce and protect it from inroads of taxation by a State beyond 'opportunities which it has given, . . . protection which it has afforded, . . . benefits which it has conferred by the fact of being an orderly, civilized society (*Wisconsin v. J. C. Penney Company*)'.

In the *Braniff* case the State of Nebraska imposed an ad valorem personal property tax on the planes and flight equipment used by taxpayer in conducting a purely interstate airlines business. The Supreme Court held that the tax was not invalid, and could be imposed under a formula allocating a percentage of taxpayer's equipment to Nebraska, based on the ratio which the landings, revenue tons carried, and originating revenues in Nebraska bore to the total of such factors in taxpayer's overall operations.

Mr. Justice Reed outlined the historical basis for the ruling, and based it upon the following premises:

> (1) That the commerce clause does not give immunity to the instrumentalities of interstate commerce from certain forms of state taxation, and such commerce may be required to pay its share of a nondiscriminatory tax burden.[54]
>
> (2) That there is no difference in principle between the power of a state to tax river boats sailing in interstate-commerce and aircraft flying in such commerce.[55]
>
> (3) That the taxable situs of movable personal property does not depend upon absolute permanency, but "upon the habitual employment of the property within the state."[56]
>
> (4) That the maintenance of rented offices, space and hangars in Nebraska, coupled with eighteen landings per day, constituted the "habitual employment of the property within the state" necessary to sustain the tax.

Mr. Justice Douglas, in a concurring opinion, sustained the validity of the formula used in the *Braniff* case on the following grounds:

> My understanding of our decisions is that the power to lay an ad valorem tax turns on the permanency of the property in the State. All the property may be there or only a fraction of it. Property in transit, whether a plane discharging passengers or an automobile refueling, is not subject to an ad valorem tax. Property in transit may move so regularly and so con-

---

[53] Braniff Airways v. Nebraska Board, 347 U. S. 590 (1949).

[54] Citing Western Livestock v. Bureau of Revenue, 303 U. S. 250 (1937) and Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157 (1953).

[55] Standard Oil Co. v. Peck, 342 U. S. 382 (1952).

[56] Pullmans Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

tinuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem.

It seems clear that the decision in the *Braniff* case carried the Supreme Court's doctrine of habitual employment of property even farther than it was announced in *Northwest Airlines, Inc. v. Minnesota.*[57] The facts in that case were somewhat similar to the *Braniff* case except that *Northwest* was a Minnesota corporation with its principal offices in Minnesota and none of its property was permanently located elsewhere. The Supreme Court held that Minnesota could levy an ad valorem tax on the entire fleet of planes and flight equipment used in interstate commerce, and (as the Court pointed out in the *Braniff* case) the decision was based largely on the fact that the taxpayer had no property permanently located in any other states.

On this point the language of Justice Frankfurter, speaking for the Supreme Court, is interesting:

> Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See State Tax Com. v. Aldrich, 316 U. S. 174, 180, 62 S. Ct. 1008 ,1011, 86 L. Ed. 1358, 139 A.L.R. 1436. No other State can claim to tax as the State of the legal domicle as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State. It is too late to suggest that this taxing power of a State is less because the tax may be reflected in the cost of transportation.

The significance of these two cases lies in the fact that the Court recognized the principle of the habitual employment of property as creating a situs for tax purposes, and then extended the principle so as to permit more than one state to use the same method of taxation, provided the

---

[57] 322 U. S. 292 (1944).

tax was apportioned fairly on the basis of the commerce carried on in each state.

The same doctrine has also been applied by the Supreme Court to vessels engaged in water transportation in the case of *Ott v. Mississippi Valley Barge Line Co.*[58] In that case the taxpayer operated a barge line on the Mississippi and Ohio Rivers, picking up and delivering freight in the several states bordering those rivers. Louisiana imposed an ad valorem tax on the vessels based on the ratio of miles of lines in that State to the miles of lines in the entire movement. The Supreme Court held:

> 1. That interstate commerce can be made to pay its way by bearing its share of a non-discriminatory tax burden which each state may choose to impose on the property or activities within its borders.
>
> 2. The validity of such a tax depends on what proportion of the property may be attributed to each such state, and whether the tax imposed by each state is in relation to the opportunities, benefits or protection afforded by the taxing state; and if the tax is fairly apportioned to the commerce carried on in each state, those requirements are satisfied. The decisions in both the *Braniff* case and the *Mississippi Valley Barge Line* case were written by Justice Douglas, who has led the Court to its farthest lengths in this series of cases.

It should be noted in this connection that the U. S. Court of Appeals of the District of Columbia has given this doctrine a somewhat narrower construction in its application to the actual instrumentalities of interstate transportation. In *Smoot Sand & Gravel Corporation v. District of Columbia*,[59] taxpayer, a Delaware corporation, the owner of tugs, scows and boats, brought them into the District on an average of once a day on various operations, but used them preponderantly outside the District and exclusively in interstate operations. The District of Columbia sought to levy an ad valorem tax on the vessels at full value. The Court held three things:

> 1. That since the vessels were tangible property the rules and the cases dealing with intangible property used in interstate commerce had no application. In other words the taxing situs of intangibles is a different problem from the taxing situs of tangible property.
>
> 2. That the taxing power of the domiciliary state over its corporate taxpayers is upon a different basis from the taxing power of any other state. And since the District was not the domicle of the taxpayer here it could not presume to tax the whole of tangible property moving as an instrumentality or vehicle of interstate commerce.
>
> 3. That if tangible property is used as a means of inter-

---

[58] 336 U. S. 169 (1949).

[59] 174 Fed. 2d 505 (1949).

state transportation, it cannot be taxed at full value in any one of the states in question. A property tax on such tangibles must be apportioned on some fair basis.

It is believed that the opinion of the Court of Appeals in the *Smoot Sand & Gravel Company* case reflects the present status of the doctrine as to the taxation of property used as an instrumentality of interstate transportation, even as that doctrine has been extended by the Courts to cover air transportation.